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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALYCE FRAHER, Plaintiff and Appellant, v. SPHERION CORPORATION et al., Defendant and Respondent.	D044005 (Super. Ct. No. GIC 791411)

APPEAL from a judgment of the Superior Court of San Diego County, William C. Pate, Judge. Affirmed.

Alyce Fraher appeals a summary judgment entered in favor Spherion Corporation (Spherion) on her claims for breach of an implied contract and for discrimination and wrongful termination based on pregnancy in violation of the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.). She contends that the evidence establishes triable issues of fact regarding each of her claims. We find no issue of fact requiring trial and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2000, Spherion, an employment staffing agency, placed Fraher in a temporary position as a recruiter in the Human Resources Department at defendants Cox Communications, Inc. and Coxcom, Inc. dba Cox Business Services (together Cox) after she learned about the position in a newspaper advertisement. Fraher signed a document agreeing to certain terms upon acceptance of employment with Spherion. The document provided, among other things, that: "I understand that the assignments I will be sent on through you [will] vary in length and are subject to termination at any time without notice . . . . I also understand that neither you nor any of your clients will have any further obligation to me after termination of my employment with you or termination of my assignment with a client." The document also allowed Spherion to revise its terms without notice and expressly stated that the document was not intended to create a contract.

Rebecca McNulty was Fraher's supervisor at Spherion and she worked on-site at Cox filling temporary positions and managing Spherion's flexible workforce at Cox. In August 2001, Fraher told McNulty that she was pregnant and asked her about health benefits for the first time. McNulty informed Fraher that employees needed to sign up for such benefits within 30 days after their start date or during an open enrollment period at the end of the year. Fraher's employment with Spherion ended in September 2001, when Cox notified Spherion that it was restructuring and no longer needed a temporary recruiter. Cox considered Fraher to be a good employee and it gave her two weeks of severance pay. Aside from Fraher, McNulty knew of no other Spherion employee that received severance pay from Cox. Spherion's policy was to find employees that were in good standing replacement

work when their assignments ended. It was also McNulty's normal practice to contact employees if another position became available and she testified she probably told this to Fraher.

Fraher filed this action against Spherion, McNulty, Cox and others, alleging in part that Spherion terminated her employment without good cause in violation of an implied contract to terminate her only for good cause. She claimed that Spherion discriminated against her and wrongfully terminated her employment based on her pregnancy and to prevent her from utilizing Spherion health benefits. She also alleged that Spherion interfered with her prospective economic advantage when McNulty informed her supervisors at Cox that she was pregnant, causing Cox to withdraw an employment offer.

Spherion moved for summary judgment or in the alternative, summary adjudication, arguing that all causes of action against it lacked merit. The trial court issued a telephonic ruling granting Spherion's motion in its entirety, which it confirmed after hearing oral argument. The trial court entered judgment in favor of Spherion and Fraher timely appealed.

DISCUSSION

1. *Standard of Review*

We review the trial court's decision granting summary judgment de novo (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)), applying the same three-step analysis required of the trial court. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1431-1432.) After identifying the issues framed by the pleadings, we determine whether the moving party has established facts justifying judgment in its favor. If the moving party has

carried its initial burden, we then decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Id*. at p. 1432.) We must strictly construe the moving party's evidence and liberally construe the opposing party's evidence (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838-839) and we may not weigh the evidence or conflicting inferences. (*Aguilar*, *supra*, 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

2. *Implied Contract to Discharge Only for Good Cause*

At-will employment may be terminated at any time, for any reason, or for no reason (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335 (*Guz*)) and California law presumes that employment for no specified term is at will. (Lab. Code, § 2922.) An employee may rebut the at-will presumption with evidence that the employer and employee expressly or impliedly agreed to termination only for cause. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 (*Foley*); *Guz*, *supra*, 24 Cal.4th at p. 337.) Generally, however, the existence of an express at-will provision in a written employment agreement signed by the employee precludes the existence of an implied contract requiring good cause for termination, as a matter of law. (*Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 37-38.)

Here, Fraher signed a document acknowledging that her employment could be terminated "at any time without notice[.]" Spherion argues this provision bars the admission of evidence of an implied contract requiring good cause for termination. A similar issue is

currently before the California Supreme Court in *Dore v. Arnold Worldwide, Inc.* (review granted July 21, 2004, S124494), and, for purposes of this discussion, we will assume that the document Fraher signed does not bar the admission of evidence of an implied contract requiring good cause for termination and consider whether Fraher's evidence created a triable question of fact as to the existence of such an implied agreement. Although Spherion objected to all of Fraher's exhibits as lacking foundation and authentication and most of Fraher's remaining evidence on the ground it was inadmissible hearsay, irrelevant, speculative or did not support her arguments, the trial court did not address these objections. Thus, we assume that the trial court considered all of Fraher's evidence and we do the same in this appeal.

An implied contract may be created by the parties' conduct, with each case turning on its own facts. (*Guz*, *supra*, 24 Cal.4th at pp. 336-337.) In determining whether an agreement to terminate only for cause exists, we consider a variety of factors, including the employer's personnel policies or practices, the employee's length of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged. (*Id*. at p. 337.) The question of whether an implied-in-fact contract exists is normally a question of fact; however, the issue may be resolved as a matter of law if the facts are undisputed and permit only one conclusion. (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1386-1387.)

In support of its motion, Spherion presented Fraher's deposition testimony wherein she admitted that her assignment with Cox was temporary and no one at Spherion promised that her employment would last any particular length of time or that she could only be

terminated for good cause. Thus, Spherion met its initial burden of establishing it never promised Fraher that she could only be terminated for cause.

By contrast, Fraher did not produce competent evidence of an implied agreement that she could not be discharged without good cause and she has not raised a triable issue of material fact necessary to defeat the presumption of at-will employment. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1151-1153.) In fact, most of the evidence she presented was not relevant to the issue of whether she was an at-will employee or not (e.g. Fraher's receipt of severance pay, the existence of available positions at Cox and Spherion, or Spherion's promises to look for replacement employment). Fraher claims that she established an implied-in-fact contract to terminate only for cause based on Spherion's company policy of finding new placements for employees in good standing and based on McNulty's alleged "promise" to find her replacement employment. Even assuming Spherion had such a policy and made this promise, we fail to see how this evidence translates into a promise to only terminate for good cause.

The pleadings frame the issues in a motion for summary judgment. (*Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699.) Fraher only alleged the existence and breach of an implied-in-fact contract to terminate only for good cause; because she did not allege the existence or breach of an implied-in-fact contract to find her replacement employment, she cannot rely on this theory in an attempt to defeat Spherion's motion for summary judgment. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342-1343.) Moreover, Fraher does not assert, nor does the record show, that she sought leave to amend her complaint before the hearing on Spherion's

summary judgment motion and she cannot seek leave to amend her pleading for the first time on appeal. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1265.)

Because Fraher failed to raise a triable issue of fact with respect to whether her employment was subject to an agreement that she could only be terminated for cause, the trial court properly granted summary adjudication on her claim for breach of an implied-in-fact contract.

3. *Employment Discrimination Claim*

The FEHA prohibits an employer from terminating or otherwise discriminating against any employee on enumerated grounds, including pregnancy. (Gov. Code, §§ 12940, subd. (a), 12926, subd. (p).) When moving for summary judgment on a discrimination claim, the employer has the initial burden of showing that unlawful discrimination did not occur by presenting evidence that negates an essential element of the employee's claim or by showing some legitimate, nondiscriminatory reason for the action taken against the employee. (Code Civ. Proc., § 437c, subd. (p)(2); see *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 202-203.)

If the employer meets its initial burden, the employee must raise an inference of discrimination to avoid summary judgment by producing substantial responsive evidence that the employer's proffered reason was untrue or pretextual or that the employer acted with a discriminatory animus. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.) "[S]peculation cannot be regarded as substantial responsive evidence" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735) and if nondiscriminatory, the defendant's true reasons need not necessarily have been wise or

correct. (*Guz*, *supra*, 24 Cal.4th at p. 358.) "Moreover, an inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination. [Citation.]" (*Id.* at pp. 360-361.) An employer is entitled to summary judgment "if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at p. 361, fn. omitted.)

Fraher alleged that Spherion fired her because she was pregnant. In support of its motion, Spherion presented evidence showing it terminated her in September 2001 because it received notification that Cox no longer needed a temporary recruiter. This evidence satisfied Spherion's initial burden of showing a legitimate, nondiscriminatory reason for terminating Fraher's employment. (Code Civ. Proc., § 437c, subd. (p)(2); *Guz*, *supra*, 24 Cal.4th at pp. 354-355.) Thus, the burden shifted to Fraher to rebut Spherion's showing by presenting substantial evidence showing that intentional discrimination occurred. (*Guz*, *supra*, 24 Cal.4th at p. 357.)

Fraher has not submitted any evidence to create a triable issue of fact as to whether McNulty's reason for terminating her was a pretext for pregnancy discrimination. Fraher admitted that she never heard McNulty make any comments that showed a bias against pregnant women and no one told her that McNulty made such comments. Fraher's argument that Spherion had a financial motive for terminating her does not show the termination was based on illegal pregnancy discrimination. Moreover, simply showing that the employer's decision was wrong or mistaken or that the employer was not wise, shrewd, prudent or

competent is insufficient because the factual dispute is whether the employer was motivated by discriminatory animus. (*Hersant v. Department of Social Services*, *supra*, 57 Cal.App.4th at p. 1002; see also *Guz*, *supra*, 24 Cal.4th at p. 358.)

Fraher also argued that Spherion failed to find her replacement employment because she was pregnant. However, the application document that Fraher signed acknowledged her understanding that Spherion had no obligation to her after her assignment with Cox ended. Despite this understanding, McNulty stated that she forwarded Fraher's resume to other Spherion offices, but her attempts to find another position for Fraher within Spherion were unsuccessful. Fraher presented no evidence showing an implied-in-fact contract existed with Spherion for perpetual assignments or that Spherion failed to provide her replacement employment because she was pregnant.

In summary, Spherion met its burden to show that it terminated Fraher for the legitimate, nondiscriminatory reason that her temporary position with Cox ended and Fraher failed to produce evidence showing Spherion's reason was a pretext to mask a discriminatory intent. Accordingly, the trial court properly granted summary adjudication of her discrimination claim.

4. *Wrongful Termination Claim*

Fraher alleged that her termination was in violation of public policy because Spherion ended her employment because she was pregnant and to avoid paying her during maternity leave. The FEHA prohibition on pregnancy discrimination provides a policy basis for a claim for wrongful termination in violation of public policy. (*Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal.App.4th 218, 227; *Badih v. Myers* (1995) 36 Cal.App.4th

1289, 1296.) However, just as Fraher failed to present evidence showing a triable issue of material fact on her pregnancy discrimination claim, she also failed to present sufficient evidence to support her public policy claim.

Fraher also alleged that Spherion terminated her in violation of public policy to prevent her from utilizing health benefits made available by Spherion. In her opposition separate statement, however, Fraher admitted that she no longer believed that this was a motivation for her termination and she has not asserted this argument on appeal, thus waiving the issue. (*Tiernan v. Trustees of Cal. State Universities & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.) Although Fraher mentioned the cost award to Spherion in her notice of appeal and also claimed to appeal from the entire judgment in Spherion's favor, she did not argue her claim for interference with prospective economic advantage or the cost award in her opening brief and these issues are also waived.

DISPOSITION

The judgment is affirmed. Spherion is entitled to its costs of appeal.

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McINTYRE, J.

WE CONCUR:

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McDONALD, Acting P. J.

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AARON, J.